No. 574

In the

Supreme Court of the United States

OCTOBER TERM, 1968

UNITED STATES,
Petitioner,

v.

ESTATE OF JOSEPH P. GRACE, DECEASED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

BRIEF IN OPPOSITION FOR RESPONDENTS

WILLIAM S. DOWNARD,
2200 Fidelity Union Tower,
Dallas, Texas 75201,
Attorney for Respondents.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10543 — 2263 VALDINA STREET — DALLAS — ME 1-3130

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BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents pray that the writ of certiorari to review the judgment entered by the United States Court of Claims on April 19, 1968, applied for in the petition filed in this Court on September 26, 1968, by the Solicitor General on behalf of the United States, be denied for the reasons hereinafter set forth.

OPINION BELOW

The opinion and judgment entered by the Court of Claims on April 19, 1968, are reported at 393 F. 2d 939, 21 A.F.T.R. 2d 1952 and 68-1 U.S.T.C ¶ 12,521, and are set forth in the appendix to the petition (App. 1a-68a.)

JURISDICTION

Regretably, the Solicitor General, in his petition, has failed to state in a candid and truthful manner the facts with reference to the date of the judgment or decree sought to be reviewed, and the time of its entry. Accordingly, it is necessary to restate the true facts as follows:

> The judgment of the Court of Claims comprised within its opinion, findings of fact and conclusions of law (App. 1a-68a), which the petition seeks to bring before this Court for review by writ of certiorari, was entered on April 19, 1968. A subsequent order entered on June 28, 1968, pursuant to stipulation of the parties, merely confirmed the amount of the recovery as previously indicated in the opinion and set forth in the findings of fact which had been made a part of the judgment previously entered on April 19, 1968. A further order was entered on July 3, 1968, amending the caption of the order of June 28, 1968, to include the names of the three individual executors as set forth in the caption of the original judgment of April 19, 1968.

The jurisdictional facts are more fully stated below.

It is the practice of the Court of Claims to formally announce and publish its ultimate decisions in all cases at a special session of the Court, known as "announcement day", held on one day of each month while the Court is in session.

At such an announcement day held on April 19, 1968, the Court of Claims formally rendered and published its final decision in this case, consisting of a fifty-five page pamphlet printed by the Government Printing Office, comprising a per curiam opinion, dissenting opinion, findings of fact and conclusion of law. This decision, as originally printed and published by the Court of Claims[1], prominently displayed, immediately below the name of the court and docket number and above the title of the case, the following inscription:

"(Decided April 19, 1968)"

This formal decision finally culminated nine years of litigation, throughout the entire course of which there had been no doubt, question or uncertainty with respect to the amount of recovery to which the respondents would be en-

[1] The version of the Court of Claims decision presented in the appendix to the petition contains a substantially altered and rearranged form and style of heading (App. 1a) as compared with the genuine printed decision of the lower court. Although the prominent inscription "Decided April 19, 1968" has been omitted, the date is submerged in a subordinate position less likely to be observed. In a more subtle attempt at deception, the headline "In the United States Court of Claims", which appeared in large, fancy black-letter type at the head of the decision as originally published by the court, has been omitted from the heading of the decision as it appears in the appendix to the petition. Yet, this same headline in large, fancy black-letter type identical in size and style to that actually appearing at the head of the formal printed decision of April 19, 1968, has been inserted at the head of the two subsequent informal typewritten orders as reproduced on pages 69a and 71a of the appendix; also, the *dates* affixed with rubber stamps on each of these subsequent orders have been omitted from the reproductions on pages 69a and 71a of the appendix. Actually, the genuine orders dated June 28, 1968, (App. 69a) and July 3, 1968 (App. 71a) including the headings thereof were wholly typewritten, except for the dates stamped thereon. While we do not wish to quarrel over the choice of type size and style, we submit that this substitution of headings and omission of dates appears deliberately designed to dissemble the true nature of the lower court's formal decision and subsequent orders, respectively, and to mislead this Court concerning the date of entry of the judgment sought to be reviewed.

titled in the event of a decision that the trust in question was not taxable as part of the decedent's gross estate.

The per curiam opinion contained in the decision rendered by the Court of Claims on April 19, 1968, expressly declared:

> "* * * The court is also in agreement with the opinions of the trial commissioner, as modified and combined into a single opinion, and hereby adopts the same, together with his findings of fact, *as the basis for its judgment* in this case. Therefore, plaintiffs are entitled to recover and judgment is entered to that effect with the amount of recovery to be determined pursuant to Rule 47 (c)." (App. 2a, emphasis added).

The conclusion of law included in this decision of April 19, 1968, stated:

> "Upon the foregoing findings of fact, which are *made a part of the judgment herein*, the court concludes as a matter of law that the plaintiffs are entitled to recover, and *judgment is entered* to that effect. The amount of recovery will be determined pursuant to Rule 47 (c)." (App. 68a, emphasis added)

On the same day, the clerk of the Court of Claims made the following entry on page eight of the court's official docket record of this case:

> APR 19 1968 Judgment for plaintiff with the amount of recovery to be determined by further proceedings. (pursuant to Rule 47 (c)). Opinion Per Curiam Dissenting opinion by Judge Davis in which Judge Nichols joins."

Rule 47 (c) of the Court of Claims rules, expressly referred to in the aforesaid judgment entered on April 19, 1968, prescribes that, where the court reserves determination of the

amount of recovery upon entering judgment that a party is entitled to recover; "in such event, the judgment on the question of the right to recover *shall be final*, subject to proceedings had under Rules 68 and 69." (Rules 68 and 69 pertain to motions for rehearing; no such motion for rehearing was filed by respondent).

Notwithstanding that the judgment entered on April 19, 1968, specified that the amount of recovery was to be determined pursuant to Rule 47 (c), the amount of recovery was clearly indicated in the opinion rendered by the court on April 19, 1968, "as the basis for its judgment in this case," and in the findings of fact which were "made a part of the judgment herein". The opinion set out that the question to be decided was whether the Internal Revenue Service acted correctly in adding to the gross estate of the decedent the sum of $1,116,888.62, representing the value of a trust created on December 30, 1931 (App. 2a), that the addition of this sum to the decedent's gross estate had resulted in the assessment of an estate tax deficiency in the net amount of $363,500.97 plus assessed interest of $55,720.08, which amounts (totaling $419,221.05) were paid by the decedent's estate on July 14, 1954 (App. 12a - 13a), that the trust in question should not be included in the estate of the decedent, and accordingly, plaintiffs are entitled to recover (App. 19a).

All of these details with respect to payment by the decedent's estate on July 14, 1954 of the net estate tax defi-

ciency and assessed interest thereon, totaling $419,221.05, as a result of the inclusion in the taxable estate of the trust property adjudged to have been wrongfully so included, were also set forth in the findings of fact. (Findings 24 (b) and (c) and 25, App. 52a - 54a; see, also, Finding 47, App. 64a), which were expressly "made a part of the judgment herein" (App. 68a), in the judgment of April 19, 1968.

Subsequently, on June 28, 1968, the court made an informal typewritten order (App. 69a) entering judgment for the plaintiffs in the sum of $419,221.05, being exactly the same amount specified in the prior decision of April 19, 1968, together with interest thereon from July 14, 1954, being the date of payment indicated in the prior decision of April 19, 1968. This subsequent order of June 28, 1968, was made pursuant to a memorandum report of the trial commissioner recommending that judgment be entered for such amount "*in accordance with the opinion of the court* and the stipulation of the parties." It was but a technical formality confirming the amount of the judgment of April 19, as indicated by the opinion on which that judgment was based and the findings of fact which were made a part of it. The amount of the wrongful assessment to be refunded, and the date of payment thereof from which interest is to be computed as provided by law, had been specified in the claim for refund filed July 13, 1956, on which this suit was based (Finding 25, App. 53a - 54a), had been alleged and admitted in the pleadings, had been set forth in findings of fact submitted in the first report of the trial commissioner filed July 20, 1964, and not excepted to by either party, set forth by the court in its

formal opinion and findings of fact made part of its judgment of April 19, 1968, and stipulated by the parties in a stipulation filed in the Court of Claims on June 12, 1968. This amount and date had at all times been known to and agreed upon by the parties and had never been subject to any question, doubt or uncertainty.

Thereafter, on July 3, 1968, the court entered a further informal typewritten order amending the caption of the order dated June 28, 1968, by expanding the designation of the plaintiffs to include, after the name of the decedent's estate, the names of the individual executors, in lieu of "ET AL". This order, like the order dated June 28, was merely confirmatory of the court's formal decision of April 19, the caption of which had similarly included the names of the individual executors. The names of these individual executors and their status as plaintiffs had also been set forth in the findings of fact which were made a part of the judgment entered on April 19 (See Finding 27, App. 54a). Thus, the order of July 3, like the June 28 order, was merely confirmatory of the judgment entered by the court on April 19.

The petitioner filed its petition for a writ of certiorari herein on September 26, 1968, the 160th day after entry of the judgment on April 19, 1968. Section 2101 (c) of the Judicial Code (28 U.S.C. § 2101 (c)) prescribes that "* * * any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceedings before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." The last phrase, "*such* judgment or decree", obviously refers back

to the *same* judgment or decree which the writ of certiorari is "intended to bring * * * before the Supreme Court for review".

It is obvious from a perusal of the petition that the writ of certiorari applied for therein is intended solely to bring before the Supreme Court for review the judgment and decision entered by the Court of Claims on April 19, 1968. The petition was not filed within ninety days after the entry of that judgment, nor within any extension of such time granted by this Court as required by the statute to invoke the jurisdiction of the Supreme Court.

In *Federal Trade Commission v. Minneapolis-Honeywell Regulator Company*, 344 U.S. 206, 97 L. ed., 245, 72 S. Ct. 245, it is held (344 U.S. at pp. 211-213):

> "Thus, the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. *Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew.* The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by it prior judgment, had been plainly and properly settled with finality.
>
> The judgment of September 18, which petitioner now seeks to have us review, does not meet this test. It reiterated without change, everything which had been decided on July 5. Since the one controversy between the parties related only to the matters which had been adjudicated on July 5, we cannot ascribe any signif-

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icance, as far as timeliness is concerned, to the later judgment.

* * * * *

"It is a principal reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period. Those statutes are not to be applied so as to permit a tolling of their time limitations because some event occurred in the lower court after judgment was rendered which is of no import to the matters to be dealt with on review." (Emphasis supplied).

Measured by these standards, the time for filing a petition for a writ of certiorari to review the judgment entered by the Court of Claims on April 19, 1968, began to run on that date, and the petition filed 160 days thereafter is not timely. Manifestly, the subsequent order of June 28, fixing the amount of recovery and date from which interest should be computed, "is of no import to the matters to be dealt with on review". The petition does not in any way question or refer to either of the subsequent orders dated June 28 and July 3, but is addressed exclusively to the judgment entered on April 19, 1968. Indeed, in its statement of the case, the petition recites the amount of the deficiency to be recovered (as confirmed by the order of June 28, 1968) as one of the undisputed facts of the case, citing in support thereof only findings which were a part of the judgment entered on April 19, 1968 (see first full sentence beginning on page 5 of the petition). Thus, it is clear on the face of the petition itself that the order of June 28 is in no way relevant to the matters to be dealt with upon review, and that the amount of recovery confirmed therein was ade-

quately determined by the findings made part of the judgment entered on April 19.

The Court of Claims was without power to extend the jurisdictional time limit within which the respondents must apply for a writ of certiorari in order to invoke the jurisdiction of this Court. It should not be assumed that the judges of the Court of Claims employed the procedure of subsequently confirming the amount of recovery under Rule 47 (c) as a device to grant the petitioner a 70-day extension of the jurisdictional time limit within which to file its petition in this Court for a writ of certiorari to review the judgment entered April 19, 1968, which they had no power to do overtly; nor should the formal decision and judgment rendered and entered by the Court of Claims on April 19, 1968, be regarded as merely an "empty form". Cf. *United States v. Hark*, 320 U.S. 531, 535, 88 L. ed. 290, 295.

Nor does there appear to be any reason in equity or fairness why the statutory time limit should be mitigated in this case. All matters that might conceivably affect the petitioner's decision whether to petition this Court for a writ of certiorari to review the judgment, or that might in any way affect the preparation or manner of presentation of its petition, were clearly spelled out in the judgment entered by the Court of Claims on April 19, 1968. Upon reading that decision, the petitioner was fully advised of every detail pertinent to its application for a writ of certiorari, including the details confirmed by the subsidiary orders of June 28 and July 3. At all times from and after the entry of judgment on April 19, the amount of recovery was known to the

respondent with sufficient certainty that it could have issued a check in full satisfaction of the judgment had it so desired, or could have prepared and filed its petition for a writ of certiorari without awaiting any further orders from the Court of Claims. That it was not necessary for the petitioner to await entry of the order of June 28 in order to ascertain the amount of recovery is especially clear in view of the fact that this amount was routinely stipulated by the parties in a stipulation filed with the Court of Claims on June 12, 1968, more than 90 days prior to filing of the petition. That stipulation stated:

> "It is hereby stipulated and agreed that the amount of judgment to be entered in favor of plaintiffs in accordance with Rule 47 (c) *pursuant to the decision of the court on April 19, 1968*, for the sum of Four Hundred Nineteen Thousand Two Hundred Twenty-One and 05/100ths ($419,221.05) Dollars * * * plus interest on the said sum * * * as provided by law from the date of payment, July 14, 1954." (Emphasis supplied).

As indicated by the stipulation, the amount of recovery was ascertained "pursuant to the decision of the court on April 19, 1968", and was not dependent upon any further proceedings or subsequent determination. Under these circumstances, the entry of the subsequent order on June 28, 1968, was obviously but a technical formality that had no practical or legal significance that would justify allowing the petitioner to delay the filing of its petition until 70 days beyond the expiration of the ninety-day period normally allowed.

Section 2101 (c) of the Judicial Code, 28 U.S.C. § 2101 (c), permits the time limit to be extended for a period not exceeding 60 days only by "A justice of the Supreme Court, for good cause shown," and clearly does not contemplate that the Court of Claims be empowered to extend the time limit for indefinitely prolonged periods by resorting to Rule 47 (c) or by any other device. When, as in this case, the Court of Claims chooses to employ its Rule 47 (c) as a convenient expedient to leave subject to subsequent confirmation an amount of recovery plainly set forth in its formal decision and judgment, to treat the subsequent confirmatory order as tolling the time limit would, in effect, empower the Court of Claims to grant an extention of time to the losing party within which to apply to this Court for review of a final judgment. Moreover, such a tolling of the time limit in these circumstances would enable the losing party to gain additional time and prolonged delay in filing its petition for a writ of certiorari simply by delaying the execution and entry of a routine stipulation, or refusing to stipulate uncontested matters on frivolous grounds.

Since the writ of certiorari intended to bring the judgment entered by the Court of Claims on April 19, 1968, before the Supreme Court for review was not applied for within 90 days after the entry of such judgment, this Court lacks jurisdiction to grant the writ of certiorari applied for in the petition filed on September 26, 1968. Accordingly, the petition for a writ of certiorari should be denied.

QUESTIONS PRESENTED

1. Whether this Court lacks jurisdiction to grant a writ of certiorari intended to bring before the Supreme Court for review a judgment entered by the Court of Claims on April 19, 1968, when such writ was not applied for until September 26, 1968, the 160th day after the entry of such judgment.

2. Whether the Court of Claims, in its decision rendered April 19, 1968, correctly interpreted § 811 (c) (1) (B) of the Internal Revenue Code of 1939, in the light of the judicially-developed "reciprocal trust doctrine", as applied to the complex and unique facts and circumstances presented in this particular case.

STATUTES INVOLVED

Section 2101 (c) of the Judicial Code (28 U.S.C. § 2101 (c)):

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days after entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days.'

Section 811 of the Internal Revenue Code of 1939 (U.S.C. 1939 Code, § 811):

> "SEC. 811. GROSS ESTATE.
>
> "The value of the gross estate of the decedent shall be determined by including the value of all property,

real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

* * * * *

"(c) * * * (1) GENERAL RULE.—To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth,) by trust or otherwise—

* * * * *

"(B) under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (i) the possession or enjoyment of, or the right to the income from, the property, or (ii) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; or

* * * * *

"Subparagraph (B) shall not apply to a transfer made before March 3, 1931; nor shall subparagraph (B) apply to a transfer made after March 3, 1931, and before June 7, 1932, unless the property transferred would have been includable in the decedent's gross estate by reason of the amendatory language of the joint resolution of March 3, 1931 (46 Stat. 1516).

* * * * *

"(d) * * * (2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936—To the extent of any interest therein of which the descedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case

of a bona fide sale for an adequate and full consideration in money or money's worth. * * * "

Joint Resolution of March 3, 1931, C. 454, 46 Stat. 1516 (made applicable by the last sentence of subsection 811 (c) (1), above):

"RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the first sentence of subdivision (c) of Section 302 of the Revenue Act of 1926 is amended to read as follows:

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, including a transfer under which the transferor has retained for his life or any period not ending before his death:

(1) The possession or enjoyment of, or the income from, the property, or

(2) The right to designate the persons who shall possess or enjoy the property or the income therefrom,

except in case of a bona fide sale for an adequate and full consideration in money or money's worth."

STATEMENT

The facts material to consideration of the question presented by the petition are concisely stated in the findings of fact made part of the judgment entered by the Court of Claims on April 19, 1968, which are set forth in the appendix to the petition (App. 32a - 68a).

The petitioner, on July 14, 1954, collected from the respondents, as executors of the estate of Joseph P. Grace (hereinafter called "the decedent"), who died on July 15, 1950, the sum of $419,221.05 as a deficiency in estate tax and interest thereon, based upon a determination that the value of assets of a trust (hereinafter called the Janet Grace Trust) which the decedent's wife, Janet Grace, created on December 30, 1931, and of which her husband, the decedent, was the beneficiary for his lifetime, was includable under Section 811 (c) of the Internal Revenue Code of 1939. Respondents claimed this deficiency assessment to be wrongful, and brought suit for refund.

Upon the death of the lifetime beneficiary of a trust, Section 811 (c) (1) (B) in plain and explicit terms authorizes inclusion of the trust property in his taxable gross estate only if and "to the extent" that such life beneficiary is also the transferor who "made a transfer * * * under which he retained" the life benefits. With equal clarity, the statute excludes from the taxable gross estate of the life beneficiary property in which he had a life estate given to him under a transfer made by another person for his benefit. To be taxable under Section 811 (c) (1) (B), the decedent must have been not merely lifetime beneficiary but also the settlor who created the trust and transferred his own property to the trust for his own benefit. In the present case, the statutory question is simply whether the facts of the case disclose that the decedent was, in reality, the "grantor", "settlor" or "transferor" who made a transfer of his own property to the Janet Grace trust.

"It is well established that the person who furnishes the consideration for the creation of a trust is the settlor even though in form the trust is created by another." *Blackman v. U. S.* (1943), 98 Ct. Cl. 413, 48 F. Supp. 362; *Lehman v. Commissioner* (2nd Cir. 1940), 109 F. 2d 99, cert. den. 310 U.S. 637. The undisputed facts are that the Janet Grace trust was created by the decedent's wife on December 30, 1931 (Finding 12 (a), App. 43a), at which time she transferred to herself and two others as trustees the family homestead known as "Tullaroan" and 40 shares of stock in a personal holding company known as Lundy's Lane Corporation (Finding 12 (b), App. 45a-46a). Janet Grace had owned the Tullaroan property since 1911 (Finding 6 (b), App. 34a). She had owned the Lundy's Lane stock since that corporation was incorporated in 1923 to hold securities belonging to her, which she had acquired as gifts from the decedent at verious times from 1917 to 1922 (Finding 12 (d), App. 46a). Thus, for many years prior to the creation of the Janet Grace trust, the Tullaroan property and 40 shares of stock had belonged exclusively to Janet Grace; it was she who "made a transfer" of those properties to the Janet Grace trust; and it was she who "furnished the consideration" for the trust. The decedent had not at any time made a transfer of any of his property to the Janet Grace trust.

The petitioner, while not disputing those facts, contended in the court below that the Janet Grace trust was made in consideration of a trust (herein called the Joseph Grace trust) that the decedent had created on December 15, 1931,

fifteen days before the Janet Grace trust had been created. After the first trial of the case in 1963, the trial commissioner made findings of fact, which were ultimately adopted by the court (Findings 1 through 30, inclusive, App. 32a - 54a) in which the facts were found to be, *inter alia*, as follows (App. 54a):

> "29. The Joseph Grace trust and the Janet Grace trust were not created, and properties were not transferred to these trusts, pursuant to any agreement, express or implied, between the decedent and Janet Grace to make reciprocal transfers of properties.
>
> "30. The transfer of property by the decedent to the Joseph Grace trust was not in consideration of the transfer of property by Janet Grace to the Janet Grace trust; and the transfer of property by Janet Grace to the Joseph Grace trust was not in consideration of the transfer of property by the decedent to the Joseph Grace trust."

Upon examination of the evidence and review of the findings, after study of printed briefs and exceptions submitted by both parties, and after oral arguments presented at a formal hearing before the five judges of the court sitting *en banc*, the court evidently agreed with these findings. That, in our view, should have adequately disposed of the case. But the petitioner, being unable to offer any serious challenge to such findings, argued vehemently on brief and in oral argument that the trusts should be assumed to have been created as a scheme or device to avoid estate taxes, based on its assertion that certain inadmissible matter not offered as evidence and witnesses not called to testify would have so indicated. Although the petitioner had not asked for a retrial, a majority of the judges[2] decided to give the petitioner

[2] Chief Judge Cowen dissented from the remand order, and Judge Collins dissented from the denial of a motion for rehearing on same.

another bite out of the apple, and entered an order on March 25, 1966, remanding the case to the trial commissioner "for a further hearing at which both parties may present further evidence as to whether the decedent was motivated in the setting up of the Joseph Grace and the Janet Grace trusts, in December 1931, by the desire to avoid or lessen estate taxes," and directing that the inadmissible matter be considered. After a re-trial in which even privileged communications between the decedent and his attorneys and an unsigned hearsay memorandum were admitted as evidence, and after briefs to the commissioner and an exhaustive analysis of the evidence, the trial commissioner proposed additional findings of fact which were ultimately adopted by the court (Findings 31 through 53, inclusive, App. 54a - 68a) after the filing of lengthy briefs, exceptions and oral arguments, examination and review by the court of the evidence and findings. After re-trial and rehearing the facts with reference to "tax-avoidance" were found to be as follows (Finding 52, App. 67a):

> "52. The evidence in the record does not indicate that Joseph P. Grace was motivated by the desire to avoid or lessen estate taxes in the setting up of the Joseph Grace trust and the Janet Grace trust in December 1931."

In this connection, the court, in its opinion, commented that the findings are "amply supported by the record" (App. 1a) and stated, with reference to the "tax-avoidance" assertion:

> "It appears from the evidence in the augmented record that Joseph P. Grace never said or did anything which would indicate or imply that he was motivated by the desire to avoid or lessen estate taxes when he created the Joseph Grace trust on December 15, 1931,

and caused his wife to create the Janet Grace trust on December 30, 1931. The evidence also establishes other logical and even compelling motives for these transactions. (App. 16a)

* * * * * *

"The reasonable inference to be drawn from the record as a whole is that Joseph P. Grace was not motivated by a purpose to minimize taxes of any kind in originally deciding to create the Joseph Grace trust and to have his wife create the Janet Grace trust, although Mr. Grace did mention that, from the standpoint of timing, he desired that the creation of the trusts be accomplished promptly in December 1931, because it was his view that a gift tax was 'coming along any day now.'

* * * * *

"It has been shown that the two trusts were not created to avoid estate taxes but merely as another step in a long-established pattern of family giving." (App. 19a)

The respondent was thus defeated in the lower court because its factual assertions were proven wrong by the evidence and its legal arguments were squarely at odds with the statutory basis of liability and the previously decided cases and founded upon factual premises that were clearly disproven by the established facts as found by the court. Being disgruntled by this defeat, the petitioner applies for review asking, essentially, that this Court adopt the respondent's version of the facts, and extend the "reciprocal trust doctrine" in an amorphous manner to indulge in the fictitious pretense that the decedent, instead of his wife, was the transferor who "made a transfer" of his wife's property to the Janet Grace trust, so as to hold it taxable to his estate.

REASONS FOR DENIAL OF WRIT

1. *There is no conflict among the decisions of lower courts with respect to the single issue of law involved in this case.*

The sole issue involved in this case is whether the "reciprocal trust doctrine", sometimes referred to as the *Lehman* doctrine, should be applied so as to treat the decedent, rather than his wife, as the transferor who "made a transfer" to the Janet Grace trust "under which he retained" the life estate therein granted to him.

That doctrine is a judicial concept which has been rationally developed and uniformly applied by the lower courts without the intervention of this Court. It is based upon the principle that "A person who furnishes the consideration for a trust is the settlor, even though in form the trust is created by another". *Lehman v. Commissioner*[3] (2nd Cir., 1940) 109 F. 2d 99, cert. den. 310 U.S. 637. It holds that when one settlor creates a trust for the benefit of another, *in consideration for* the creation of a similar trust for his own benefit by that other person, then the respective settlors will be interchanged for tax purposes so as to treat each as the settlor of the trust for his own benefit. It is the

[3] Petitioner, by a significant omission that changes the meaning of the sentence, misquotes the Lehman case on page 9 of the petition. The omitted material is indicated in italics below:

> The decisive point is that the decedent *by transfer of his share to the brother or for the brother's use or according to the brother's direction* caused the brother to make a transfer of property in trust under which the decedent had the right to withdraw $150,000 from principal * * *. (109 F. 2d 100, italics indicate words omitted in petition).

Thus, it was not the fact that the *decedent* "caused" his brother to make the trust, but that he did so *by transfer of his share to the brother,* whereby he furnished a consideration or quid pro quo, that resulted in reciprocal taxation.

furnishing of a consideration, or *quid pro quo*, for the transfer in trust that brings the doctrine into play and constitutes the person who transferred the consideration as the taxable party deemed to have "made a transfer * * * under which he has retained * * *" the rights to which he is entitled under the trust. In terms of Section 811 (c) (1) (B); the consideration transferred by the decedent is deemed to be the "property * * * of which the decedent has at any time made a transfer", which is to be included in his estate.

As explained in *Estate of Moreno v. Commissioner* (8th Cir., 1958), 260 F. 2d 389, 390:

> "The question of whether the doctrine of the Lehman case can be applied—whether the trusts are crossed or reciprocal trusts—is one of fact. It is simply a question whether one trust was made in consideration of the other."

This simple factual test has been unanimously and uniformly applied in all of the cases dealing with allegedly reciprocal trusts, including all of the cases cited by the petitioner. As with any factual test that is uniformly applied, the *results* of the cases have differed, depending upon the *facts* proved in each case. Opposite facts have produced opposite results. The differing results of the cases are not the result of any conflict or disagreement among the lower courts, but are rather due to distinguishable facts.

Thus, where the evidence has convinced the court that a trust executed by one spouse for the benefit of the other was, in fact, executed in consideration of a trust executed by the other spouse for the benefit of the former, the spouse whose estate tax liability is in question has been held taxable reciprocally as settlor of the trust created by the other

spouse. *Estate of Hanauer v. Commissioner* (2nd Cir., 1945), 149 F. 2d 857, cert. den. 326 U.S. 770; *Orvis v. Higgins* (2nd Cir., 1950), 180 F. 2d 537, cert. den. 340 U.S. 810; *Cole's Estate v. Commissioner* (8th Cir., 1944), 140 F. 2d 636; *Estate of Carter v. Commissioner* (1959), 31 T.C. 1148; and *Estate of Fish v. Commissioner* (1941), 45 B.T.A. 120.

On the other hand, it is equally well established that, when the evidence indicates that the decedent's transfer in trust was *not* intended as the consideration or *quid pro quo* inducing his spouse to create a trust for his benefit, the *Lehman* doctrine is inapplicable, even where the husband and wife have simultaneously executed trusts having identical corpora and identical reciprocal provisions for the benefit of each other. *Estate of Guenzel v. Commissioner* (8th Cir., 1958), 258 F. 2d 248; *McLain v. Jarecki* (7th Cir., 1956), 232 F. 2d 211; *Estate of Newberry v. Commissioner* (3rd Cir., 1953), 201 F. 2d 874, 38 A.L.R. 2d 514; *In re Lueder's Estate* (3rd Cir., 1947), 164 F. 2d 128; *Tobin v. Commissioner* (5th Cir., 1950), 183 F. 2d 919, cert. den. 340 U.S. 904; *Commissioner v. McLean* (5th Cir., 1942), 127 F. 2d 924; *Estate of Ruxton v. Commissioner* (1953), 20 T.C. 8[illegible]; *Estate of Resch v. Commissioner* (1953), 20 T.C. 171; *Welch v. Commissioner* (1947), 8 T.C. 1139; and *Estate of Lindsay v. Commissioner* (1943), 2 T.C. 174.

While the Court of Claims, in the decision sought to be reviewed, may not have shed any new light on the body of law represented by the foregoing cases, it does, at least, reach a result consistent with all of those prior decisions as applied to its findings of fact. The absence of a consideration or *quid pro quo* furnished by the decedent (see findings

29 and 30, App. 54a) would make the *Lehman* doctrine inapplicable under all of the above-cited cases, and any error of the Court of Claims in imposing an additional burden upon the respondent to prove an absence of tax-avoidance motivation is immaterial to the result of the case, since that burden was amply met.

The petitioner, in its petition, attempts to convince this Court, by partial quotations selected at random and quoted out of context, that a conflict of decisions exists between the decision herein and two decisions of the Third Circuit Court of Appeals, as opposed to other decisions cited in the opinion (Pet. 12-14, 19). Such a conflict, however, must rest on a belief that the courts, in the decisions cited by the petitioner, paid mere lip service to the requirement of a consideration or *quid pro quo*, while surreptitiously fabricating a fictional pretense of finding consideration that was in fact nonexistent. We submit that such a belief in the lack of integrity and intellectual honesty of the courts is without justification, and that it must be assumed that a court's finding of consideration or absence thereof in any particular case is adequately supported by a rational analysis of the facts disclosed by the evidence in the record before the court.

The cases relied upon most heavily by the petitioner are *Estate of Hanauer v. Commissioner*, supra, *Orvis v. Higgins*, supra, and *Cole's Estate v. Commissioner*, supra. These cases strongly support the legal principal followed by the decision sought to be reviewed, and are contrary to the theory fabricated by the petitioner from phrases quoted out of context in the petition.

In the *Hanauer* case, the Second Circuit stressed very strongly the crucial test of a finding whether that decedent's transfer in trust was in fact the consideration or *quid pro quo* that induced and motivated his wife to create the trust for his benefit. Explaining its prior decision in the *Lehman* case, the court stated (149 F. 2d at p. 858):

> "* * * this court held that to the extent that *the decedent's property*, by its transfer in trust, had served as *the quid pro quo effective to bring about his brother's transfer*, for purposes of the estate tax the decedent must be treated as the actual settlor under the indenture executed by his brother—or, in the words of the Act, as the person who had 'made a transfer' in the sense that *by the transfer of his own property* and the consequent impoverishment of his own estate he caused the transfer of his brother's property to be made." (Emphasis supplied.)

The court in Hanauer was reviewing a decision of the Tax Court in which it was expressly found as a fact that "Each created his respective trust in consideration of the other. Also, that Carrie H. Hanover created her trust because her husband, the decedent, created his trust." The court declared (149 F. 2d at p. 858):

> "We take these findings to mean that the estates created by decedent's trust *served as a quid pro quo for the trust which he caused his wife to make*." (Emphasis supplied.)

Upon review of the record, the court found "abundant evidence to support those findings." The facts emphasized in the opinion dealt with the "mental attitude of the decedent's wife" and her "knowledge and active participation" in the development and execution of *both* trusts, and her "belief" that the decedent was creating a trust of substantial dimensions. These mental factors pertaining to the wife's

subjective motives and intentions were relied upon "to support a finding that *her transfer was caused by his.*" (149 F. 2d 859)

In the decision sought to be reviewed herein, the Court of Claims distinguished the *Hanauer* case because of opposite facts concerning the motivation of the wife, since in the instant case there was no basis in the record for a finding that Janet Grace, in transferring Tullaroan and 40 shares of stock to the Janet Grace trust, was influenced in any way by the circumstance that the decedent had previously created the Joseph Grace trust; and, indeed, there is no evidence in the record that Janet Grace even *knew* about the creation of the Joseph Grace trust by the decedent (App. 15a; and see finding 12(e), App. 47a). In *Hanauer*, the wife had created her trust "because her husband, the decedent, created his trust"; in the instant case, on the other hand, the wife had created her trust "merely because the decedent requested that she do so". (App. 15a).

In *Hanauer*, the court emphasized that the motivation of the *wife*, and not of the decedent himself, was the crucial test — whether *she* was motivated or caused to transfer her property in trust by his transfer in trust. If the wife's creation of her trust were motivated, induced, and caused by the decedent's transfer in trust, then his transfer of property was the consideration or *quid pro quo* for his wife's trust, justifying treatment of him as its settlor. Since the case did not involve the question whether the wife should be treated as settlor of the husband's trust, it was immaterial whether the wife's transfer had been the motivating cause of the decedent's transfer in trust. To emphasize that the

wife's motivation, rather than that of the decedent himself, was the decisive factor, the court commented that "*his* motive was not controlling" (149 F. 2d at p. 859). In its petition, the petitioner twice quoted the latter phrase (Pet. 9-10 and 16) to support its argument that motives are "not controlling", and therefore the Court of Claims erred in inquiring into subjective motives. We submit, however, that this is a perversion of the *Hanauer* decision, which regarded the subjective motivation of the *wife* as all-important to ascertain whether her transfer was caused by his.

The *Hanauer* case also affirms strongly that the question whether one trust was made in consideration of the other trust is purely a question of fact, as to which the results will differ when different facts are found. The court found "no fundamental inconsistency" between the decisions of the Tax Court in that case and in the case of *Estate of Lindsay v. Commissioner,* supra, wherein similar trusts in substantially equal amounts executed by husband and wife at about the same time were held not taxable reciprocally under the Lehman doctrine, because the facts as found by the Tax Court indicated that the two trusts "were not made each in consideration of the other" (2 T.C. at p. 179). The Second Circuit pointed out that in both cases "it was within the power of the trier of fact to make its own conclusion from the basic facts", and that "neither due regard for legal principle nor indeed for consistent action required it to make a similar finding on the different record presented here * * *". The *Hanauer* decision further distinguished *Commissioner v. McLean,* supra, saying "* * * we need only

reiterate that the findings made there upon a different record cannot serve to impeach the findings here." So it is apparent that the only "conflict" between the Court of Claims decision in the instant case and the Second Circuit decision in the *Hanauer* case is that opposite facts have been found upon different records, requiring a different result by consistent application of the same legal principle.

Similarly, in *Orvis v. Higgins*, supra, the Second Circuit regarded the issue as purely a question of fact concerning subjective intentions of the parties, devoting the main body of its opinion to an analysis of the circumstances under which an appellate court may reject a trial judge's findings of fact. Petitioner cites the *Orvis* case as support for its argument that there is an "inference of reciprocity inherent in the fact that the two trusts were conceived of and established at about the same time" (Pet. 10). Actually, the case says nothing of the kind and, indeed, contains no mention of whether the trusts were conceived of and established at about the same time or at different times. Instead, the opinion recites the facts with reference to conversations which the husband and wife had with their son, their attorney, and each other, indicating a course of bargaining, negotiation and agreement in which the wife was an active participant, leading to the factual conclusion "that each of those trusts was made in consideration of the other" (180 F. 2d at p. 540). The opinion not only refers to "a case like this, on an issue relating to intention", but also states "we find that reciprocity was *intended*", (180 F. 2d at p. 541). So it can hardly be said that the case stands for anything

other than a finding of fact with respect to the subjective intentions of the parties as gathered from the evidence in the record of that particular case.

The case of *Cole's Estate v. Commisioner*, supra, most strongly relied upon by petitioner (Pet. 10, 11, 12, 14, 15, 16, 17, 18, 19), is somewhat complex, in that both husband and wife had died less than three weeks apart and both their estates were before the court in one consolidated case. The court advanced two alternative grounds of decision—one upholding the Tax Court in taxing each decedent *reciprocally* as settlor of the trust created by the other spouse, and the other, alternative, theory holding that each decedent's estate should be taxed *non-reciprocally* upon "the 300 shares which he himself transferred to the trust created by him" (140 F. 2d at p. 638). In that case, since both estates were before the court, it made no difference whether each decedent was taxed upon the trust that he himself (or she herself) created or upon the precisely identical trust created by his wife (or her husband). But in the present case it does make a difference whether the decedent is deemed to have been settlor of his own trust or of his wife's trust. Whatever else the *Cole's Estate* case may stand for, it certainly adheres rigidly to the requirement of a fact finding that one trust was made in consideration of the other trust, in order to tax the settlor *reciprocally* as having made a transfer to the *other* settlor's trust. Its first approach is to construe the findings of the Tax Court to mean that one trust was made in consideration of the other trust, pursuant to an exchange. But assuming, "arguendo"

that no specific finding of consideration was made, the court holds that the respective settlors *cannot* then be taxed reciprocally as settlors of each other's trusts, but, instead, each must be treated for tax purposes as settlor of *the trust which he himself created.* Whichever theory of *Cole's Estate* is considered, there is no conflict with the decision of the Court of Claims in the present case, which is in accord with the first theory that a finding of consideration is essential to reciprocal taxation, and also in accord with the second theory that in the absence of a finding of consideration the decedent must be regarded as having transferred his property to the trust which he himself created, rather than the trust created by his wife.

The *Cole's Estate* case was subsequently clarified and explained by the Eighth Circuit in *Estate of Guenzel v. Commissioner*, supra, where the court explained that the second alternative, regarding each settlor as non-reciprocal transferor to his own trust, was "the real basis for the decision". (258 F. 2d 254). In the *Guenzel* case, two trusts created by a decedent and his wife on the same day, identical as to form and value, having the same trustee, each naming the other spouse as primary life income beneficiary and himself as secondary life income beneficiary, were held to be not taxable reciprocally because of the failure to prove that one trust was in fact created in consideration of the other trust. In arriving at that conclusion, the court relied upon and quoted extensively with approval the cases of *Estate of Newberry v. Commissioner*, supra; *McLain v. Jarecki*, supra; and

Estate of Ruxton v. Commissioner, supra; also citing with approval *In re Lueders' Estate*, supra (258 F. 2d at pp. 251-254). The Court concluded:

> "We have heretofore indicated our view that there was no legal consideration for the creation of the respective trusts. Since there was no bona fide consideration for the establishment of the trusts, no foundation existed for the application of the Lehman doctrine."

Curiously, petitioner claims the *Guenzel* case as supporting its theory (whatever its theory is!) (Pet. 11, 16). Yet *Guenzel's* case is obviously in the mainstream of all the cases holding, as does the Court of Claims decision sought to be reviewed, that the *Lehman* doctrine is inapplicable when the facts of the case disclose the absence of a legal consideration.

The petitioner also claims that its theory is supported by *Glaser v. United States*, (7th Cir., 1962), 306 F. 2d 57; *Olsen v. Reismer*, (7th Cir., 1959), 271 F. 2d 623; and *Commissioner v. Warner*, (9th Cir., 1942), 127 F. 2d 913, but none of these cases can be construed to conflict with the Court of Claims decision in the present case. The *Glaser* and *Olson* cases are entirely irrelevant to the present case — both deal with transfers of jointly owned property in which the decedent retained an interest, and both hold only that the decedent's estate is taxable on his *own* half interest of which he had made a transfer under which he retained a life interest; neither case held the decedent taxable on his *spouse's* half interest in the jointly owned property. The petitioner's assertion that the latter two cases, which do not even involve the "reciprocal trust doctrine", somehow over-

ruled *McLain v. Jarecki,* (see Pet. 11, footnote 6) is patently absurd. And the petitioner points to nothing in *Commissioner v. Warner*, supra, which is even claimed to be in conflict with the main body of law holding that a finding of consideration furnished by the decedent is essential, that case being merely an obvious application of the *Lehman* principle that the person who furnishes the consideration for a trust is its settlor.

While the petitioner would lead this Court to believe that the Court of Claims decision in this case is in conflict with the decisions of the Tax Court (Pet. 19), the petition fails to cite a single decision of the latter court which it claims to be conflicting. The Tax Court, however, has consistently held that the reciprocal trust doctrine "should be applied only when clearly warranted by the particular facts of a case considered in the light of the decided cases," and that "We think the *motives* of the parties certainly have a bearing on their *intentions* with respect to unity of purpose, interdependence, and *consideration or the lack thereof.*" *Estate of Ruxton v. Commissioner*, supra, (20 T.C. at p. 494). Also the Tax Court has said that "Whether the party executing a trust instrument is the real settlor, or merely a nominal settlor * * * is, in each case, a question of fact. It is an inference to be drawn from all the facts and circumstances attendant upon the execution of the agreement." *Estate of Resch v. Commissioner*, supra, (20 T.C. at p. 183). When the Tax Court last considered the applicability of the reciprocal

trust doctrine in 1959, it said, in *Estate of Carter v. Commissioner*, supra, with reference to the "principle of the *Lehman* case" (31 T.C. at 1152):

> "Whether the principle is applicable in a given situation is, of course, dependent upon the particular facts presented. * * * Thus the issue resolves itself into a question of fact, namely whether Ernest and Laura each created his (or her) trust in consideration of the creation of the trust by the other. * * * The question is one of the motivations of the two settlors. Their candid testimony might, of course, be the best evidence of their motives in creating the trusts involved. Since they are both dead, we must rely upon other evidence to discern their motivations."

With reference to the cases of *Newberry's Estate v. Commissioner*, supra, and *McLain v. Jarecki*, supra, the Tax Court said in the *Carter* case (31 T.C. at p. 1154):

> "Because the question involved in all reciprocal trust cases is factual, little purpose is served by an extensive discussion of the factual background of each case. As we understand the *Newberry* and *McLain* cases, the decisive test for the application of the *Lehman* doctrine is whether the trusts were executed in consideration of each other. Our treatment of the issue here is consistent with this principle and we do not regard our disposition to be contrary to those cases."

Consistently with that principle, whenever the evidence and facts before the Tax Court have indicated the absence of intentions or motives to create one trust in consideration for the other, that court has held the *Lehman* doctrine inapplicable and has refused to tax a decedent's estate as if he were the settlor of a trust created without consideration by his spouse. See *Estate of Lindsay v. Commissioner*, supra;

Estate of Ruxton v. Commissioner, supra; *Estate of Resch v. Commissioner*, supra; cf. *Welch v. Commissioner* (1947), 8 T.C. 1139.

And, with respect to what constitutes consideration, the Tax Court (then Board of Tax Appeals) declared at the very inception of the reciprocal trust doctrine, in *McLean v. Commissioner*, (1940) 41 B.T.A. 1266, affirmed in *Commissioner v. McLean*, supra, as follows (41 B.T.A. at p. 1267):

> "The fact that the trusts were created at the same time and contained reciprocal provisions does not prove that one was created in consideration of the other, and the fact that the transfers were in equal amounts and made at the same time does not show that one was made in consideration of the other."

There is nothing in the consistent line of Tax Court decisions on the issue involved herein to suggest that the Tax Court would have made any different findings of fact than did the Court of Claims in this case, or that having made such findings it would have applied any different principles of law or reached any different result.

The only "conflict" that exists here is simply that the theory advocated by the petitioner is in conflict with *all* of the court decisions on the subject. The petitioner's theory, fabricated out of a scatter-shot quotation of selected phrases out of context, appears to be that whenever spouses have each created a trust, one spouse must always be treated for tax purposes as settlor of the trust created by the other spouse, rather than as settlor of the trust which

he himself created, notwithstanding that the facts of the case show that one trust was not made in consideration of the other. No court has ever so held. The consistent and harmonious application of the factual test, whether one trust was made in consideration of the other trust, does not require that the Government win in all cases, even when the facts are contrary to its contentions.

Although the Court of Claims questionably classified the seemingly harmonious cases into what it characterized as "two divergent views", it found that the facts of this case justified the same result under either view, and refrained from choosing between what it conceived to be "two lines of cases". (App. 4a-5a, 15a-16a). While we are not able to apprehend the divergence between the precedent cases, at least it is clear that the decision of the Court of Claims in this case is not in conflict with *either* of the "lines of cases", since it applied *both* "divergent views" and found that the facts of this case would entitle respondents to recover under *either* view.

There being no conflict between the Court of Claims decision sought to be reviewed and any other decision of any lower court, nothing could be resolved by granting of a writ of certiorari in this case.

2. *The judgment sought to be reviewed involves no issue of current importance.*

The "reciprocal trust doctrine" was productive of much litigation during the 1940's and 1950's, when the doctrine was developed, defined and refined in a long series of cases in

which this Court declined to intervene. (See cases cited above). This Court denied writs of certiorari in the *Lehman*, *Hanauer*, *Orvis* and *Tobin* cases, supra, in 1940, 1945 and twice in 1950, respectively.

The decision of the Court of Claims sought to be reviewed, like a ghost from a by-gone era, stands as the only solitary case in which any court in the country has been called upon to decide the issue of applicability of the reciprocal trust doctrine during the present decade. Very likely, it is the last case on the subject that ever will be litigated. For, since the principle was first established in the famous *Lehman* case, supra, in 1940, it has been so widely recognized and understood by tax and trust lawyers that it is extremely unlikely that any trusts would be permitted to fall into the apparent patterns of "reciprocal" trusts, subjecting them to needless taxes (except possibly in isolated instances of ignorant and ill-advised persons who may unwarily fall into this tax trap). The plethora of litigation on this issue during the 1940's and 1950's centered about trusts created prior to 1940, when the Lehman doctrine became known. Few of these pre-1940 trusts now remain in existence.

The trusts involved in the present case were created in 1931, when estate tax rates were so low as to be of negligible consequence, and these trusts were proved to have been made without seeking or obtaining any kind of tax advice. By contrast, in the modern age, when very high estate tax rates have prevailed for so many years, it is difficult to imagine anyone irrevocably transferring a million dollars'

worth of property in trust without first ascertaining the tax consequences and obtaining expert guidance.

There is no need at this point in history to go back and clarify the law applicable to trusts created in 1931 under circumstances which have long since ceased to exist.

This particular litigation about 1931 trusts was delayed in reaching the courts because of the unusual combination of circumstances that (1) the decedent lived for 19 years after creation of the trusts, so that the estate tax consequences did not become pertinent until his death in 1950; (2) the issue was not raised until an estate tax deficiency was assessed four years after his death; (3) claim for refund was not filed until the last day permitted by the statute of limitations, and the claim was not acted upon promptly, with the consequence that this suit was not filed until 1959, when the decedent had been dead for 9 years; and (4) this litigation consumed 9 more years from the filing of the complaint in 1959 to final judgment in 1968. These unusual circumstances have produced a case dealing with facts and law no longer relevant. The case should be consigned to the tomes of ancient lore, from whence it came.

An authoritative pronouncement from the Supreme Court defining the scope and limits of the reciprocal trust doctrine, and its application to circumstances existing in 1931, might have been salutary during the 1940's or 1950's, when many of these cases were being litigated. But at this late date, after the doctrine has long since ceased to be a subject of litigation, such a pronouncement could have no beneficial

effects. A doctrine so well established and widely accepted that it can be administered without producing any current litigation should not now be disturbed. A re-definition of the doctrine at this time could only serve to open new vistas of litigation as yet unthought of.

3. *The issue involved is purely a question of fact which has been determined from careful scrutiny and exhaustive analysis of the unique facts and circumstances shown by the evidence in this particular case.*

The question presented is essentially a determination of the facts of this particular case. These facts have been exhaustively analyzed, scrutinized, weighed, reviewed and determined, through a long and elaborate judicial process of trial and re-trial, briefing and re-briefing, argument and re-argument, by a trial commissioner and a seven-judge court — all eight of whom are competent and experienced jurists. There is no justification or need for the Justices of the Supreme Court to devote similar endless hours to a similarly exhaustive study of the voluminous record in this case to determine again facts that have already been determined. And there is no reason to suppose that if it did so this Court would arrive at any different fact findings than those already found by the Court of Claims. Nor is there reason to suppose that a more cursory and less detailed investigation would produce more reliable factual conclusions than those already reached by the Court of Claims.

Moreover, a re-finding of the factual issue involved would have no significance in any other case except this one. The

facts presented in this record are unique. No other case will ever involve the same facts as this one. The decision in this case, whether or not it is reviewed and re-decided by this Court, will not have much value as precedent in deciding other cases that involve different facts. At best, it can serve only as an analogy to other facts determined from other evidence presented in other cases.

The petitioner points to no error of substance or procedure in the lower court's findings of fact, but in essence asks this Court to reach a different factual conclusion. The factual conclusion reached by competent triers of fact in the court below should be permitted to stand undisturbed.

4. *There is no tax loophole requiring remedy by judicial legislation.*

The petitioner asserts that, unless reversed, the decision of the Court of Claims "will have reopened a glaring loophole in the estate tax law inviting new attempts by husbands and wives to deplete the value of their taxable estates while retaining full enjoyment of all their assets, simply by creating cross trusts in favor of each other with remainders to their children" (Pet. 19, and see Pet. 7). The assertion is ludicrous.

The decision of the Court of Claims certainly is not susceptible to the interpretation that it repeals the *Lehman* doctrine. Instead, it scrupulously applies the doctrine in perhaps the strictest terms ever applied by any court. It adds a new and additional requirement, never before imposed by any court, that in order to prevent inclusion in a decedent's

estate of a trust created gratuitously and without consideration by his wife, the estate must prove that the decedent was not motivated by a desire to avoid or lessen estate taxes when he suggested to his wife that she create the trust for his benefit. And that requirement cannot be dismissed as mere *obiter dictim,* for the Court of Claims actually remanded the case for another trial on that point after it had been proved and found that the two trusts had not been created in consideration of each other. The addition of this new requirement of proving the absence of tax avoidance motives adds a ponderous — and as a practical matter virtually unbearable — new burden of proof upon the taxpayer. This is hardly opening a "loophole". In all other respects, the decision conforms strictly to the long line of cases that make reciprocal taxation depend upon a finding that one trust was created in consideration of the other trust.

Surely, any persons attempting the tax avoidance scheme described by petitioner would be caught in their own "loophole", for they would not be able to prove initially, as respondents have proved in this case, that neither trust was made in consideration of the other trust. And even if they did convince a court on that point they would be unable to sustain the burden of proving by positive evidence, as respondents have proved in this case, that neither trust was in any way motivated by a desire to avoid or lessen estate taxes.

More important, justice requires that the estate involved in this case be taxed according to what the decedent, Joseph P. Grace, and his wife actually did with respect to the trusts

they created, instead of according to the petitioner's theoretical imaginings as to what *other* persons might attempt to do with respect to *other* trusts. It should be noted that even the petitioner does not claim that Joseph P. Grace and Janet Grace created these trusts in 1931 because of any motive to avoid estate taxes nor that either trust could have possibly had the effect of avoiding estate taxes. Since no "tax loophole" was involved in this case, it would be an injustice to these taxpayers to exact from them taxes not justly owed, on the pretense that this is necessary to prevent other taxpayers from creating loopholes in the future.

In the trust created by Joseph P. Grace on December 15, 1931, he appointed himself as one of the trustees, and retained the power in conjunction with either one of the other two trustees to terminate the trust at any time by distributing the principal of the trust to his wife [Finding 11 (a), App. 38a, clause *First*]. Thus, the decedent retained to himself a clearly taxable power in the Joseph Grace trust (see, e.g., *Lober v. United States*, 346, U.S. 335). The creation of that trust did not "deplete the value of his taxable estate" as the petitioner contends (Pet. 19), for it remained taxable as part of his estate as long as that trust remained in existence. When it terminated on the death of Janet Grace in 1937, and passed to the decedent's children, he lost all control over it, power with respect to it or interest in it, irrevocably and irretrievably. Only then did it cease to be taxable as part of his estate.

The decedent's wife, likewise, retained a power as trustee to terminate the Janet Grace trust at any time by distri-

buting the principal of the trust to the life tenant. That power undoubtedly left the Janet Grace trust taxable as part of the estate of Janet Grace under such cases as *Lober v. U. S.*, supra. Also, it appears that trust would remain taxable to her estate under Section 811 (c) (1) (B) and its predecessor, the joint resolution of March 3, 1931 (supra, p. 14) because she in fact retained the possession and enjoyment of the trust property for the remainder of her life [Finding 12 (c), App. 46a; see, also, App. 14a].

The decedent and his wife, having each created trusts that were *legally ineffective* to remove the properties which they respectively transferred in trust from the taxable estate of either of them, can hardly be said to have availed themselves of a tax "loophole".

The only significant benefit to the decedent under the Janet Grace trust was the right to continue living in the family homestead where he had lived for twenty years. The same result could have been accomplished if Janet Grace devised to her husband a life estate in the homestead under her will; or she could have by inter vivos gift granted him a legal life estate or an interest as beneficiary for life of a trust. In either instance, the property would not be includible in her *husband's* taxable estate merely because he was life tenant. There was no estate tax or other tax *advantage* to be gained by Janet Grace's transfer to the Janet Grace trust at a time close to the decedent's transfer to the Joseph Grace trust; indeed, the *only* tax or other consequence of these trusts being created within the same month was the *adverse* effect of creating the very issue litigated in this case,

subjecting the life tenant to the risk that his wife's trust might be taxed as part of his own estate when it would not otherwise be so taxable.

So, it is clear that the *real* issue here is not whether this decedent's estate should be allowed to benefit from a "loophole" resulting from the fact that he himself had created another trust only 15 days before his wife gave him the life estate in the homestead; but, instead, whether the mere fact of such timing is sufficient reason to require his estate to pay taxes on the property of which he was life tenant, when that property would otherwise not be taxable to his estate.

The petitioner's effort in this case is not to deprive the respondents of the benefit of a "tax loophole", but rather an attempt to extend the reciprocal trust doctrine, invented in 1940, retroactively to reach a trust created in 1931 which would not otherwise be taxable to this life tenant's estate, as a *tax trap* of which the decedent in 1931 could not be aware.

If it is a proper judicial function to close tax "loopholes", it just as clearly is not a proper judicial function to set tax traps for the unwary by indulging in legal fictions to extend the statute beyond its plain meaning. There is neither justice nor equity in the petitioner's attempt to exact a tax from the life tenant's estate in this case.

5. *The decision is right.*

The decision of the Court of Claims correctly applied the legal principle followed by the courts in all of the cases cited

above and in the petition. Its findings of fact are abundantly supported by the evidence and are unchallenged, and these facts can lead to but one legal conclusion in the light of the decided cases.

The simple question of fact whether one trust was created in consideration of the other may leave room for courts to reach different results when the facts are different. But that is what courts are for. Judges, lawyers and laymen alike — even tax collectors — understand and are familiar with the legal content and meaning of the term "in consideration of". This test, as laid down in the *Lehman* case and uniformly applied by the courts, has produced harmonious and proper results and is being successfully administered without resort to current litigation. It should not be changed.

But even if the consideration test be abolished as urged by the petitioner, the results of this case must be the same under any other test. For manifestly, when the decedent's wife granted him a life estate in the homestead which they had occupied for the past 20 years, and which they both intended to continue to occupy as their family home for the rest of their lives, with no change whatever in the use or enjoyment of the property resulting from his wife's transfer in trust [App. 14a; finding 12(c), App. 46a], this did not in any practical economic or realistic sense produce a result comparable to, or have the effect of, the decedent's having retained a life estate in the commercial investment properties that he had transferred in trust for his wife and children fifteen days earlier. It would require an unduly tortured and perverse interpretation of Section 811 (c) (1)

(B) to include the Janet Grace trust in the decedent's estate under a statute that in plain terms includes only "property * * * which the decedent has at any time made a transfer * * * under which he retained * * *" a life estate, when the facts of the case clearly demonstrate that the decedent's life estate in that trust property was received in a transfer made by his wife which was, in substance and reality, in intent and in effect, a gratuitous gift by her to him. To distort and extend the statutory meaning to include the Janet Grace trust as part of the decedent's taxable estate in this case would exalt form over substantial practical economic effects of the actions of the parties and the circumstances shown to exist.

The result of the decision sought to be reviewed is, in the light of the facts shown to exist, fair, just, right and in accord with the plain meaning and intent of the statute. The decision should not be disturbed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM S. DOWNARD,
2200 Fidelity Union Tower,
Dallas, Texas 75201,
Attorney for Respondents.

October 28, 1968.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was served on October 27, 1968, upon the Solicitor General by depositing it in a United States post office with air mail postage prepaid, addressed to the Solicitor General at his post office address.

Wm S. Downard

William S. Downard

ENTRY OF APPEARANCE

I hereby enter my appearance herein as counsel of record for the respondents.

Wm S. Downard

William S. Downard